IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 50 of 2010

BETWEEN: JEAN BAPTISTE CALO
Claimant

AND: PETRE MALSUNGAI
First Defendant

AND: MINISTER OF LANDS
Second Defendant

AND: DIRECTOR OF LAND RECORDS
Third Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. Willie Daniel for the Claimant*
Mr. Stephen Joel for the First Defendant
Ms. Christine Lahva for the Second and Third Defendants

Date of Decision: *29 September 2010*

RULING

1. On 19 April 2010 the Claimant filed a claim in the Supreme Court seeking the following orders:-

> "*1. An order that the First Defendant had obtained leasehold title No. 11/OG26/036 by fraud, mistake or omission contrary to section 100 of the Land Leases Act [CAP. 163];*
>
> *2. An order that the First Defendant's name be struck off the Land Registrar by the Third Defendant as Lessee of Leasehold title No. 11/OG26/036;*
>
> 3. *An order that the Claimant's name be inserted into the Land Register by the Third Defendant as Lessee of Leasehold title No. 11/OG26/036.*

4. The nature of the claim is described in paragraph 5 as being one:

> "*... for fraud, mistake and or omission pursuant to section 100 of the Land Leases Act [CAP. 163] and the claim is against the*

First Defendant in the process of obtaining registration of lease title NO. 11/OG23/036 to his own name and the Second Defendant for having knowledge of the First Defendant's unlawful conduct but allowing the registration to go ahead."

5. This paragraph is then followed by a mass of "*particulars*" which ends with the Claimant asserting that "*... the First and Second Defendants have defrauded the Claimant and his family of their right to lease title No. 11/OG26/036*".

6. On 26 April 2010 the First Defendant filed a defence denying any fraud or mistake in the registration of the lease in his name as lessee and pleading "*... the claim is res judicata by reference to the decision of Judge Tuohy in Supreme Court Civil Case NO. 152 of 2007 by the Claimant against* (all the present defendants) *over the same leased property.*"

7. On 4 May 2010 the First Defendant filed an application to strike out the claim on the basis that it was "*an abuse of process*" in that the claim had already been decided upon by Justice Tuohy and was "*res-judicata*".

8. On 29 July 2010 defence counsel filed written submissions and counsel for the Claimant filed a belated response on 25 August denying that the claim is res-judicata and asserting that the claim before Justice Tuohy was a claim for damages whereas "*the present claim is one instituted under section 100 of the Land Leases Act [CAP. 163]*".

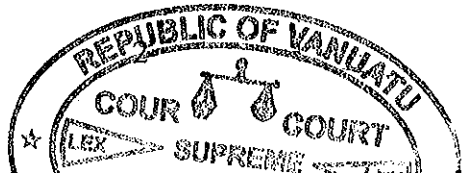
9. I accept at once that there is a difference in the nature of the relief(s) sought in the Claimant's earlier claim in Civil Case No. 152 of 2007 and the present case but that alone does not prevent or preclude the application of the principles or doctrine of res-judicata which is based on the public interest that there should be finality in litigation and that a party should not be sued twice on the same matter.

10. In this regard Defence counsel submits:

"In our humble submission the prayers sought whether to issue order for damages or to rectify registration of the lease are not proper issue requiring determination under this principle. They are merely resulting effects of litigation dependant on determination of the main issue which is fraud.

In other words the claimant cannot now say that in his previous claim he was only claiming damages whereas he now wishes to rectify the registration of the lease.

In order for the Court to issue orders for damages or to order rectification in the claimant's favour the common issue this Court is required to resolve is the same as that resolved in Civil



Case No. 152 of 2007, i.e. to determine first whether or not the first defendant registered the lease by way of fraud.
The issue of fraud in registration of Lease Title No. 11/OG26/036 which would have entitled the claimant to an order for damages or rectification of lease register has been determined by this Court in Civil Case NO. 152 of 2007. There is no other issues of fraud to determine. If this claim is allowed to continue it will be proceeded in contravention of the principle of res judicata."

11. Claimant's counsel in opposing the application submits inter alia:

> *"2. The matter of Supreme Court Civil Case no. 152 of 2007 decided by Justice C. N. Tuohy on 13 June 2008 is a totally different. It is a case alleging damages however the present claim is one being instituted under Section 100 of the Land Leases Act [CAP. 163].*
>
> *3. Section 100 of the Land Leases Act allows transparency in the registration of Leases in the Land Lease register maintained by the Third Defendant.*
>
> *4. The law is that if the Claimant can prove that there is fraud, mistake or an omission in the registration of the Lease in this case then the lease must be rectified accordingly.*
>
> *5. The Claimant says that the present case is not the same as that of Civil Case No. 152 of 2007.*
>
> *6. The Claimant will be denied his right under Section 100 of the Act if the claim is struck off."*

12. Plainly other than highlighting the difference in the legal basis for the claims in the two actions and the difference in the nature of the relief sought, Claimant's counsel no-where identifies or explains how the issues (if any) differ in the two actions.

13. In this latter regard the Claimant's present claim purports to be based on "*fraud, mistake and or omission pursuant to section 100 of the Land Leases Act [CAP. 163]*", but no-where in the claim are the three heads under section 100 separated or isolated in the pleadings or supported by enumerated particulars or facts that are specifically identified as constituting a material "*mistake*" or "*omission*" on the part of a named defendant. At its highest, the "*particulars*" provided by the Claimant raises potentially suspicious behaviour on the part of land registry officers and ministerial personnel who had a role in the processing and registration of the First

Defendant's lease, but no actual rectifiable "*mistake*" or "*omission*" is identified or asserted against anyone. In brief, the only discernible issue raised by the pleadings is fraud in the registration of the First Defendant as a lessee of the land which once belonged to the Claimant's late father.

14. In **Crown Estate Commissioners v. Doreat County Council [1990] 1 ALL ER 19** Millett J. describes the doctrine in the following convenient terms at p.23:

> "*Res-judicata is a special form of estoppel. It gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question even though the decision may be wrong. If it is wrong, it must be challenged by way of appeal or not at all. As between themselves, the parties are bound by the decision, and may neither relitigate the same cause of action nor reopen any issue which was an essential part of the decision. These two types of res-judicata are nowadays distinguished by calling them 'cause of action' estoppel and 'issue' estoppel respectively.*"

15. **Halsbury's Laws of England (4th Edition) Vol 16 para 977** summarizes the relevant principles of issue estoppel as follows:-

> "*A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, is an error of fact or laws, or one of mixed fact and law.*

16. To succeed in its defence of "*res judicata*" the Defendant must establish:

(a) The parties in both cases are the same;

(b) The issues in both cases are the same;

(c) The previous judgment was final and conclusive and binds every other Court; and

(d) The decision was by a court of competent jurisdiction.

17. I accept that the parties in the earlier case, namely Civil Case No. 152 of 2007 before Tuohy J. and the present claim are not identical, nevertheless, in all relevant and material respects including their respective capacities, the parties in the two actions are, the same. I am also satisfied that the ruling of Tuohy J. on 13 June 2008 was that of "*a court of competent jurisdiction*" in that it was delivered pursuant to applications brought by the Defendants (including the present First Defendant) to strike out the claim and after Tuohy J. heard the applications with all counsels for the parties in attendance.

18. I accept that an application to strike out a claim is normally brought by way of an interlocutory application during the course of a proceedings and before a trial has been held, but, that does not necessarily mean that the court's decision is interlocutory or is not "*final and conclusive*". It is not so much the title or the timing of the application that is brought before the Court, but rather, the effect of the court's ruling or decision that determines whether or not an estoppel can arise.

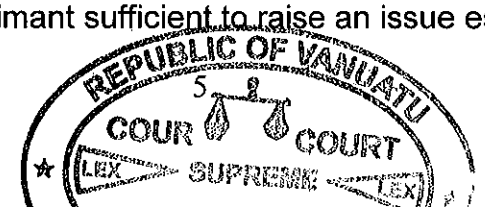
19. **Rule 7.1** of the **Civil Procedure Rules** (CPR) helpfully defines an interlocutory order as "*an order that does not finally determine the right duties and obligations of the parties to a proceeding*". Significantly however **Rule 9.10** of the CPR which deals with the striking out of a claim is to be found in Part 9 of the CPR which is headed "***ENDING A PROCEEDING EARLY***". I accept that **Rule 9.10** does not include as a ground for striking out a claim, the absence of a reasonable cause of action, but that such a jurisdiction exists in the Supreme Court has been settled in the decision of the Court of Appeal in **Noel v. Champagne Beach Working Committee [2006] VUCA 18**, albeit, that it is a jurisdiction to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material.

20. Tuohy J. was conscious of this cautionary approach when he struck out the claim in Civil Action No. 152 of 2007 in his 7 page Ruling. He was also satisfied that he had sufficient material before him to properly and fully deal with the application despite there being no sworn statement filed by the Claimant and despite there not being a trial. The relevant decision of Tuohy J. reads as follows:

> "*I am satisfied that the claimant has no reasonable cause of action and that his claim of fraud is untenable. His claim is struck out*".

Costs were also ordered in favour of the first, third and fourth defendants to be agreed or fixed by the Court on application.

21. In my respectful view Tuohy J's order striking out the claim had the immediate effect of bringing the proceedings in Civil Case No. 152 of 2007 to an early end by finally determining it against the claimant. Furthermore his ruling that the claim of "*fraud is untenable*" was a determination of that issue against the claimant sufficient to raise an issue estoppel.



22. That an order dismissing or striking out a claim is capable of giving rise to issue estoppel even though the Court making the order has not heard argument or evidence directed to the merits is supported by the following persuasive authorities:

- Khan v. Golecha International Ltd. [1980] 2 ALL ER 259;
- SCF Finance Co. Ltd. v. Masri [1987] 1 ALL ER 194;
- Barber v. Staffordshire County Council [1996] 2 ALL ER 748; and
- Kirkless Metropolitan Borough Council v. Farrell [1999] UKEAT 1060.

23. Particular reference need only to be made to the decision in the **Kirkless** case where a claim was dismissed upon withdrawal by the applicant and the Court of Appeal in upholding a plea of res-judicata based on that single line decision said:

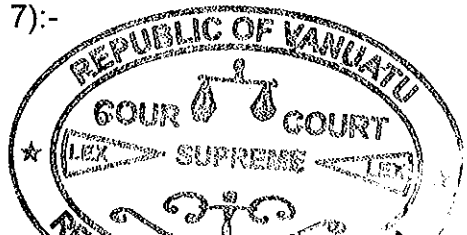
> "*... here the order of the tribunal was plainly a decision in substance as well as in form. It dismissed the application. Nothing could be more plainly an exercise of the tribunal's power to dispose by its own authority of the claim before it. It is true there was no hearing on the merits, but that was the very objection taken and rejected in* ***Barber's*** *case.*"

24. In his Ruling Tuohy J. sets out the basis of the claim before him as follows:-

> "*The statement of claim is rambling and difficult to follow ... although it seeks to attack the basis upon which lease number 11/OG23/036 was granted to the defendants, it is not a claim for rectification of the register under section 100 (1) of the Land Leases Act. Rather it is a claim for damages in an enormous sum, seemingly for fraud in the issue and registration of the lease in 1996. Although in the latter paragraphs of the claim it alleges in very general terms that "the defendants defrauded the claimant and/or forged the claimant's father's signature ... there is no evidence filed in any event.*"

25. From the foregoing it is plain that Tuohy J. was not only conscious of the requirements of section 100 (1) of the Land Leases Act that cancellation of a registration and rectification of a lease may be granted upon it being established that "*registration has been obtained, made or omitted by fraud or mistake*", but he also expected a claim for relief under section 100 to be included in the claim before him in Civil Action No. 152 of 2007.

26. In addressing the present defendants' joint application to strike out the claim Tuohy J. said (at paragraph 7):-



"*The application ... is brought on even more fundamental grounds. They rely upon a Native Court Judgment No. 12 dated 14 April 1975 which is attached to the sworn statement of the first defendant Lesline Malsungai. In order to show the relevance of that, it is necessary to ascertain the basis of the claimant's claim to the leasehold title.*"

27. The claim against the First Defendants (who were jointly the present defendant and his wife) is described by Tuohy J. as an allegation:

"*... that there was fraud in the granting and registration of the lease to Lesline and her husband Petre in 1996 because it was done without the consent or knowledge of the claimant. There also seems in paragraph 24 to be some allegation of forgery of the claimant's father's signature. This seems to be the basis of the claim for damages*".

28. Tuohy J. then carefully considers the evidence before him and concludes (at paragraph 16):-

"*It is in respect of the grant and registration of the lease that the claimant bases his claim that he was defrauded. It is clear from the above that, whatever right the claimant might have had in the land after his father died, he waived it in favour of his brother George in 1974 and there has been a binding judgment of the Native Court accordingly. He therefore has no standing to complain of the grant of a lease to Petre and Lesline in respect of that land.*" (the waiver document)

29. It is noteworthy that the claim before Tuohy J. makes no mention of the waiver document or the Native Court Judgment which the Claimant would have been well aware of at the time of issuing his claim, nor was any attempt made to amend the claim once it was raised in a sworn statement filed by the defendant's wife. No attempt was made either to file a sworn statement to explain or challenge the waiver document before Tuohy J.

30. In his claim in the present action however, the Claimant admits the existence of the waiver document and addresses it in the following terms:-

"*(i) The Claimant and his family totally dispute the document signed by George Calo and the native advocate dated 23rd September 1974 and say as follows:-*

(i) They all have never signed any such document waiving their rights to title 2274 which is also known as 'Lot 20 of title 1093' to their brother George Calo.

(ii) *They all deny the validity of such document;*

(iii) *They say the document was a fraud and orchestrated to defraud their family from the family's land;*

(iv) *Any kind of business deal made between their brother George Calo and the First Defendant is their own and cannot claim their right over the land."*

31. It appears from the above that an aspect of the so-called "*fraud*" now being alleged is in the creation of the document evidencing the waiver of the claimant's rights in his late father's estate land in favour of the Claimant's elder brother George Calo. It is noteworthy that at the relevant time the present First Defendant had no personal involvement with the creation of the waiver document nor was he a party to the Native Court judgment sanctioning it, and, therefore any fraud perpetrated in respect of the waiver could not possibly taint the First Defendant's leasehold title which was acquired from the then Minister of Lands (not George Calo) on 18 January 1996 (i.e. 22 years after the creation of the waiver document).

32. Tuohy J. summarily rejected the Claimant's counsels oral challenge of the waiver document when he said "*... the Court cannot go behind the judgment of the Native Court. It must accept a court judgment on its face while it stands.*" The same holds true today in respect of the waiver issue raised in the present claim which has been subsumed by a court judgment that has not been appealed or set aside.

33. I am also satisfied that the omission or failure on the Claimant's part to challenge the waiver document in the proceedings before Tuohy J. gives rise to a further estoppel under what has come to be known as the extended principle of res-judicata or the "*rule in Henderson v. Henderson*" which was recently restated in **Barrow v. Bankside Agency Ltd. [1996] 1 WLR 257** in the following terms at p.260:

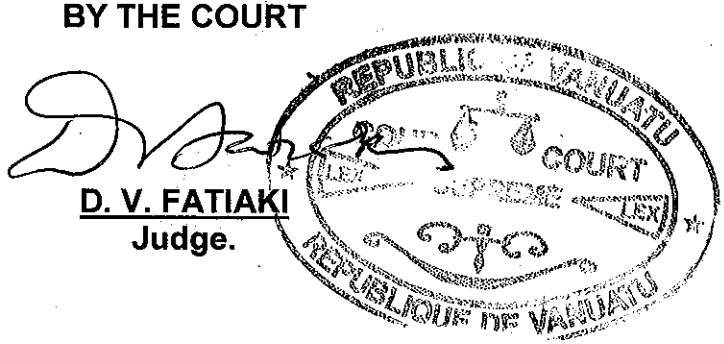
> "*It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction to bring their whole case before the Court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims, or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by*

successive suits when one would do. That is the abuse at which the rule is directed."

34. For the foregoing reasons the application is granted and the claim in the present case is struck out as an abuse of process. Costs are awarded on a standard basis summarily assessed at VT30,000 to be paid to the First Defendant within 21 days.

DATED at Port Vila, this 29th day of September, 2010.

BY THE COURT



D. V. FATIAKI
Judge.